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No. 83-329

In the Supreme Court of the United States

OCTOBER TERM, 1983

COUNTY OF ROCKLAND, PETITIONER

v.

NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly dismissed petitioner's petition for review for lack of jurisdiction.

2. Whether the Nuclear Regulatory Commission acted reasonably and in accordance with its regulations in declining to take enforcement action for deficiencies in emergency preparedness at the Indian Point nuclear power plants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 709 F.2d 766. The December 22, 1982 decision of the Nuclear Regulatory Commission (Pet. App. A24-A41) is reported at 16 N.R.C. 1698. The February 2, 1983 decision of the Commission (App., *infra*, 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1983. The petition for a writ of certiorari was filed on August 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

1. 28 U.S.C. 2344 provides in pertinent part:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. * * *

2. 10 C.F.R. 50.54(s)(2)(ii) is set forth at Pet. App. A53.

STATEMENT

Petitioner seeks review of the decision of the Nuclear Regulatory Commission (NRC), dated December 22, 1982, refusing to take immediate enforcement action with respect to preparedness for radiological emergencies at the Indian Point Unit 2 and 3 nuclear power plants in Buchanan, New York.

1. The Commission's rules provide that when the NRC finds that the status of emergency preparedness at an operating nuclear power plant does not provide reasonable assurance of adequate protective measures in the event of a radiological emergency, the Commission is to notify the licensee that, unless deficiencies are corrected within a four-month period (which is commonly referred to as the "120-day clock"), the Commission will determine whether the reactor shall be shut down, or other action taken, pending completion of the corrective actions. 10 C.F.R. 50.54(s)(2)(ii) (Pet. App. A53). The order challenged in the present case involves the implementation of these rules, which became effective on April 1, 1981.

In March 1981, in the course of preparing to implement the new rules, the NRC asked the Federal Emergency Management Agency (FEMA) for its findings and determinations on state and local offsite emergency plans for Indian Point. On April 23, 1981, FEMA responded that it found

two major problem areas in state and local planning for all five nuclear reactors located in New York State: (1) a conflict in organizational relationships and the assignment of responsibilities for emergency management, which was in part the result of an ambiguity in state law; and (2) a lack of specificity in the plans. The NRC informed the licensees that unless these deficiencies were corrected within 120 days, the NRC would determine whether to shut the facilities down or take other enforcement action. Pet. App. A10, A25.

Soon thereafter, the New York Legislature eliminated the ambiguity in state law by providing that primary responsibility in the event of a radiological emergency lies with county authorities. In August 1981, shortly before the "120-day clock" was to expire, FEMA reported to NRC that its earlier concerns had been partially answered by the new legislation, and that "the present state of planning is generally adequate to carry out the responsibilities of the State and local governments in the case of an accident at these sites" (II R.17). Accordingly, the NRC staff advised the nuclear licensees in New York that, on the basis of FEMA's evaluation, it contemplated no enforcement action at that time (Pet. App. A10).

On March 3, 1982, FEMA conducted an exercise at Indian Point to test the adequacy of onsite and offsite preparedness for radiological emergencies. On May 18, 1982, the legislature of Rockland County — a county which in part lies within the 10-mile emergency planning zone surrounding the Indian Point units — enacted a resolution (1) declaring that the County would not cooperate in emergency planning and emergency exercises for Indian Point; and (2) barring County personnel from offering any assistance to federal agencies working to assure preparedness for radiological emergencies at the Indian Point plants. III R.3.

On August 2, 1982, FEMA informed the NRC that there were significant deficiencies in emergency preparedness at the Indian Point plants. FEMA's evaluation was based, inter alia, on its review of the radiological emergency response plans of New York State and the counties surrounding the plant, including Rockland; of the performance of those jurisdictions during the March 3 emergency exercise; and on the Rockland County Legislature's resolution of noncooperation. On the following day, the Commission notified the Indian Point licensees that, unless the significant deficiencies identified by FEMA were corrected within 120 days, the NRC would consider whether to shut the plants down or take other enforcement action. Pet. App. A11, A26.

One day later, on August 4, 1982, the Union of Concerned Scientists (UCS) and the New York Public Interest Research Group (NYPIRG) wrote to the Commission requesting an order for the immediate shutdown of the Indian Point plants. The Commission referred the UCS/NYPIRG request to the Director, Office of Inspection and Enforcement, for treatment as a petition under 10 C.F.R. 2.206.[1] On November 26, 1982, the Director denied the UCS/NYPIRG request (see App., *infra*, 1a).

Thereafter, on December 22, 1982, the Commission issued a decision concluding, pursuant to 10 C.F.R. 50.54(s)(2)(ii), that no shutdown or other enforcement action was necessary with respect to Indian Point Unit 2 in the few months that would elapse before corrective actions

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[1] 10 C.F.R. 2.206 provides in pertinent part:

> (a) Any person may file a request for the * * * Director, Office of Inspection and Enforcement * * * to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. * * *

were scheduled to be completed (Pet. App. A24-A41).[2] In determining that the planning standard deficiencies noted by FEMA did not warrant immediate shutdown, the Commission relied in part on FEMA's conclusion that remedial actions that had been undertaken and those scheduled for the next few months "constitute offsite plans that will be feasible and capable of implementation" (*id.* at A29). In addition, the Commission stated that it would continue to monitor the progress of corrective actions, noting that FEMA would be conducting an emergency exercise in March 1983 (*id.* at A30). The Commission stated that it would revisit the status of emergency planning after receiving FEMA's post-exercise report (*ibid.*).[3]

On February 2, 1983, the Commission issued a further order adopting the December 22 decision as its response to the August 4, 1982 NYPIRG/UCS request for shutdown (App., *infra*, 1a-3a).

2. Prior to the issuance of the February order, petitioner filed in the court of appeals a petition for review of the Commission's December 22, 1982 order. In March 1983, NYPIRG and UCS filed their own joint petition for review of the February 2 denial of their shutdown request. The petitions for review were consolidated by the court of appeals.

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[2]Unit 3 was not expected to operate during this period for other reasons (Pet. App. A29).

[3]FEMA conducted the emergency exercise on March 9, 1983. On April 20, based on its observation of the exercise and evaluation of planning documents, FEMA briefed the Commission concerning its assessment of preparedness. In an order dated June 10, the Commission concluded that adequate interim compensatory actions had been taken and that shutdown of the plants was not warranted. That order is presently being challenged by petitioner in the D.C. Circuit (*County of Rockland* v. *NRC*, No. 83-1837). In its petition for review, Rockland County is also challenging the December 1982 order of the NRC at issue here.

Rockland County and the other petitioners in the court of appeals argued that the Commission, in its December 22 and February 2 orders, had failed to follow its emergency preparedness regulations (1) by considering factors other than those explicitly listed in 10 C.F.R. 50.54(s)(2)(ii), and (2) by declining to take enforcement action in the absence of a conclusion that overall emergency preparedness was adequate. They also argued that the Commission had an insufficient basis in fact to conclude, pursuant to Section 50.54(s)(2)(ii), that there were adequate interim compensatory measures, that the deficiencies were insignificant, or that there were compelling reasons for continued operation of the Indian Point plants.

The court of appeals dismissed Rockland County's petition for review for lack of jurisdiction and denied the petition of NYPIRG and UCS on the merits (Pet. App. A1-A23). The court noted that Rockland County had failed to participate in the December 1982 proceedings before the Commission and had failed to seek administrative review of the NRC's December 1982 order. The court concluded that, because Rockland County was not a "party" to the agency proceedings under review, it failed to satisfy the jurisdictional requirements of 28 U.S.C. 2344. Pet. App. A16-A18.

Turning to the merits of the petition for review filed by NYPIRG and UCS, the court concluded that the Commission has considerable latitude in identifying the pertinent factors for deciding whether to take enforcement action, including factors not explicitly listed in 10 C.F.R. 50.54(s)(2)(ii), and also in determining whether those factors have been satisfied (Pet. App. A21-A22). The court then ruled that the Commission's December 1982 decision was not irrational in its assessment of the FEMA reports or in its conclusion that enforcement action was inappropriate. The court refused to substitute its judgment for that of the Commission, concluding that "no convincing evidence"

had been presented "to discredit the factual findings and conclusion reached by the Commission" (*id.* at A22-A23).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decision of any other court, and does not warrant review.

1. Petitioner contends (Pet. 7-8) that the court of appeals erred in dismissing its petition for lack of jurisdiction. This contention is frivolous. As the court of appeals observed (Pet. App. A16-A17), 28 U.S.C. 2344 provides that "[a]ny *party* aggrieved by the final order [of an agency] may * * * file a petition to review the order in the [appropriate] court of appeals" (emphasis added). Petitioner, as a "person whose interest may be affected" by the NRC proceedings, could have been admitted to those proceedings "as a party." See 42 U.S.C. 2239. Because petitioner did not participate (or even seek to participate) in the proceedings before the NRC, petitioner plainly is not a "party" entitled to judicial review within the meaning of the statute. See *American Trucking Associations, Inc.* v. *ICC*, 673 F.2d 82, 84 (5th Cir. 1982), cert. denied, No. 82-86 (Mar. 7, 1983); *Gage* v. *AEC*, 479 F.2d 1214, 1217-1221 (D.C. Cir. 1973). See also *Nader* v. *NRC*, 513 F.2d 1045, 1054-1055 (D.C. Cir. 1975).[4] Accordingly, the court of appeals properly held that it lacked jurisdiction to consider Rockland County's petition for review under 28 U.S.C. 2344.

2. In any event, the court of appeals properly upheld the NRC's decision declining to take enforcement action despite finding deficiencies in emergency preparedness at

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[4]We note that petitioner also could have sought leave to intervene in the UCS/NYPIRG review proceeding in the court of appeals. See 28 U.S.C. 2348. Petitioner, however, did not do so.

Indian Point, and this issue clearly is not of sufficient general importance to warrant this Court's review. To begin with, the decision below turned, not on any question of statutory construction, but on the NRC's interpretation and application of its own regulations, regulations that have been invoked only three times since their promulgation in 1981. Moreover, petitioner does not assert any conflict between the court of appeals' decision and the decision of any other court. Thus, this case does not represent a suitable occasion for this Court's exercise of its certiorari jurisdiction.

Petitioner's claims relate principally to the factors used by the Commission to assess the advisability of enforcement action for emergency preparedness deficiencies, and to the application of those factors to the Indian Point situation. Petitioner argues that the Commission acted arbitrarily and capriciously in basing its determination, inter alia, on the conclusion that "the remaining problems would likely be corrected within a short period of time" (Pet. App. A21). But the NRC regulation at issue, 10 C.F.R. 50.54(s)(2)(ii), authorizes the Commission to consider, "*among other factors*," whether "adequate interim compensating actions have been *or will be taken promptly*" (Pet. App. A53; emphasis added). In view of this language, which petitioner does not challenge as inconsistent with the Commission's statutory mandate, the court of appeals correctly declined to place "unwarranted restrictions" on the Commission's decisionmaking process (Pet. App. A21).

In its review of the substance of the Commission's decision, the court of appeals observed that "[t]he test here is primarily one of rationality. If the Commission based its order on substantial relevant evidence, fairly ascertained, and if it has made no clear error of judgment, this court is not authorized to overturn that order" (Pet. App. A22, quoting *Cross-Sound Ferry Services, Inc.* v. *United States*,

573 F.2d 725, 730 (2d Cir. 1978)). Applying this test, the court held that the Commission's decisions "were not irrational," that there was "substantial evidence in the record to support the Commission's decision," and that it would not substitute its judgment for the Commission's (Pet. App. A22-A23).

The court's ruling, affirming a Commission decision that was fully articulated and based on the administrative record, reflects a sound evaluation of the relevant law and facts. Petitioner, in effect, is asking this Court to weigh once again the facts already weighed by the Commission and the court of appeals and to reach a different conclusion. This Court has stated, however, that it will intervene for such a purpose "only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974), quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Petitioner does not, and could not, argue here that the court of appeals misunderstood or grossly misapplied the applicable standards for judicial review. Petitioner argues only that the court of appeals should have reached a different conclusion. This claim does not merit this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nuclear Regulatory Commission

OCTOBER 1983

DOJ-1983-10

APPENDIX

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts
James K. Asselstine

In the Matter of		
CONSOLIDATED EDISON CO. OF NEW YORK, INC., and the POWER AUTHORITY OF THE STATE OF NEW YORK		Docket Nos. 50-247 50-286
(Indian Point, Units 2 and 3)		

ORDER

On November 26, 1982 the Director of the Office of Inspection and Enforcement issued DD-82-12, which denied an August 4, 1982 petition from the Union of Concerned Scientists (UCS) for immediate shutdown of Indian Point, Units 2 and 3. UCS argued that shutdown was required because of deficiencies in emergency preparedness identified by the Federal Emergency Management Agency in a letter to the NRC staff dated August 2, 1982. On August 3, 1982 the NRC staff notified the licensees for the Indian Point units that, pursuant to 10 CFR 50.54(s)(2)(ii), it was initiating a "120-day clock"; at the end of this period, if the

deficiencies were not cured, the Commission would decide whether to take enforcement action. In November 1982 the Commission decided to make that determination itself, and on December 23, 1982, the Commission issued such a decision, CLI-82-38.

CLI-82-38 represents the Commission's views on the present need for enforcement action with regard to the emergency preparedness situation at Indian Point. As such, it supersedes the earlier enforcement decision by the Director. In view of CLI-82-38 and of subsequent events, the Commission believes that review of DD-82-12 would serve no useful purpose. Thus we decline to review the Director's Decision. The separate views of Commissioner Asselstine are attached.

It is so ORDERED.

For the Commission*

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 2nd day of February, 1983.

*Commissioner Gilinsky did not participate in this decision.

ADDITIONAL VIEWS OF COMMISSIONER ASSELSTINE

For the reasons set forth in my dissenting opinion to the Commission's December 23, 1982 decision (CLI-82-38), I would have taken further enforcement action in the form of a show cause order for the continued operation of the Indian Point plants. However, I agree that the Commission majority's position in that decision supercedes [sic] the earlier enforcement decision by the Director of the Office of Inspection and Enforcement.